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Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–14–04 OF 2008
ALIZATUL KHAIR J
4 MARCH 2011

Revenue Law — Income tax — Assessment — Appeal against deciding order of Special Commissioners — Whether proceeds from sale of building ought to be assessed in year of assessment 1999 or 2000 — Whether relevant year of assessment in relation to sale of building was completion date as stated in SPA or actual completion date — Whether special commissioners had erred in fact and in law — Cross-appeal — Whether respondent should impose penalty against appellant taxpayer — Whether incorrect return made in good faith — Deductions — Whether appellant's golf membership expenses were entertainment expenses and thus deductible under s 33 of the Income Tax Act 1967 — Income Tax Act 1967 ss 23, 24, 33, 113(1) & (2)

Statutory Interpretation — Construction of statutes — Purposive approach — Intention of Parliament — Whether Parliament intended s 23(a) of the Income Tax Act 1967 ('Act') to be used to construe meaning of word 'debt' in s 24 of the Act — Whether by use of word 'or' in s 23(a) Parliament intended provision to be read disjunctively — Penalty provisions — Intention of parliament in enacting penalty provisions — Income Tax Act 1967 ss 23(a), 24, 113(1) & (2)

On 4 March 1998, the appellant had entered into a sale and purchase agreement ('the SPA') to sell building A ('the building'). The SPA was conditional on the purchaser obtaining approval from the Foreign Investment Committee ('FIC approval') within two months from the date of the SPA. Although the purchaser obtained FIC approval on 9 May 1998, he requested for the completion date for the sale of the building to be extended to 30 April 1999 so as to be able to secure finance for the purchase of the property. The appellant agreed to this request provided it was allowed to collect the rents for the building until 30 April 1999 and on condition that the purchaser pays a 5% interest on the deposit until 30 April. The purchaser agreed to the terms and the completion date was extended to 30 April 1999. The proceeds from the sale of the building were assessed for income tax in the year of assessment 1999 ie the basis year 1998. The appellant appealed to the Special Commissioners of Income Tax ('the special commissioners') against the assessment raised by the respondent. Before the special commissioners, the appellant argued that the proceeds from the sale of the building ought to be assessed in the year of

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assessment 2000, ie the basis year 1999, as the sale was completed on 30 April 1999. The appellant submitted that the terms of the SPA were varied when it agreed to extend the completion date of the sale of the building to 30 April 1999 and that this was in accordance with accepted accounting principles and ordinary commercial practice. As such the appellant submitted that by virtue of this completion date, the respondent should only raise assessment in the year of assessment 2000. The respondent on the other hand contended that the sale of the building accrued in the year ending 1998 when the SPA became unconditional upon the fulfilment of the conditions set out in the SPA. Thus it was the respondent's case that the relevant year of assessment in relation to the sale of the building was the year of assessment 1999. The special commissioners found that the sale was completed on 9 May 1998, ie the date the FIC approval was obtained and that the proceeds from the sale of the building were to be assessed in the year of assessment 1999 (item 1 of the deciding order). Further, the special commissioners also found that the respondent should not impose a penalty under s 113(2) of the Income Tax Act 1967 ('the Act') and that the penalty imposed should accordingly be waived (item 2 of the deciding order); and that the appellant's golf membership expenses were not entertainment expenses and thus deductible under s 33 of the Act (item 3 of the deciding order). This was the appellant's appeal against item 1 of the deciding order and the respondent's cross-appeal against items 2 and 3 of the same deciding order. The appellant submitted that the special commissioners had erred in law and reached a conclusion that was inconsistent with the primary facts and that under s 24 of the Act only a debt owing was to be treated as gross income. It was the appellant's case that in the present case the purchaser did not owe a debt to the appellant until the completion date, which was 30 April 1999, and that since the debt only arose on 1 May 1999 it should be assessed for tax in the year of assessment 2000.

Held, dismissing the appellant's appeal and the respondent's cross-appeal with no order as to costs:

(1) Although s 23 of the Act did not specifically define the word 'debt', it could be inferred from the headnote and the opening words of that section that the intention of legislature was that s 23(a) of the Act was to be used to construe the meaning of the word 'debt' in s 24 of the Act. When s 23(a) of the Act is applied to the word 'debt' in s 24 of the Act it would mean a debt in a liquidated sum, whether or not due or due and payable. Thus, any amount or sum ascertained in any relevant basis period in respect of any stock sold or services rendered would be treated as gross income of a person for that period. As such, the question of whether or not the sum was due or due and payable did not arise as long as the amount was ascertained and in effect s 24 of the Act empowered the respondent to tax a debt which was not yet due or due and payable. In the present case, the debt in respect of the sale of the building was ascertained

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at the end of the basis year 1998 and the fact that the amount was to be paid or payable later did not change the proposition that once the sum was ascertained and the stock in trade had been sold, that sum was taxable in the year the sum was ascertained. Thus the special commissioners were correct in fact and in law when they held that the SPA became absolute and unconditional upon the purchaser obtaining the FIC approval and that the amount became due or a debt owing to the appellant in the year of assessment 1999 (see paras 22, 27, 38 & 42).

(2) Even if the appellant was right and under s 24 of the Act only a debt owing was to be treated as gross income, based on the facts of this appeal there was a sum owing to the appellant by the purchaser at the end of the basis year 1998. Having ascertained that there was a sum owing to the appellant in the basis year 1998, the question that arose was whether that sum constituted a 'debt owing' under s 24 of the Act. However, the cases cited by the appellant were in support of the legal definition of 'debt' or 'debt owing' and did not relate to ss 23 or 24 of the Act but to the meaning of 'debt' generally under the law (see paras 32–35).

(3) The word 'due' in s 23(a) of the Act should not be construed to mean 'payable' because the provision clearly stated 'due or due and payable'. The intention of Parliament in using the word 'or' was that the provision should be read disjunctively and to provide a distinct meaning to the word 'due' and the word 'payable' (see paras 41 & 43).

(4) The special commissioners were correct in their finding that the appellant's incorrect return was made in good faith and that the penalty imposed by the respondent in respect of the same should be waived. The respondent's contention that s 113(2) of the Act did not provide the defence of good faith was without basis. The penalty provisions in ss 113(1) and (2) of the Act are to punish taxpayers who deliberately submit incorrect tax returns and information and it was not the intention of Parliament to punish innocent taxpayers. Further, it was not mandatory for the respondent to impose a penalty in all tax audits (see paras 51).

(5) The respondent's argument that the Special Commissioners had erred in allowing the golf membership expenses to be deducted when the appellant's notice of assessment for the year of assessment 2002 showed no chargeable income was without basis (see paras 55).

[Bahasa Malaysia summary

Pada 4 Mac 1998, perayu telah memasuki perjanjian jual beli ('PJB') untuk menjual bangunan A (bangunan tersebut'). PJB tersebut adalah bersyarat ke atas pembeli untuk memperoleh kelulusan darpada Jawatankuasa Pelaburan Asing ('kelulusan JPA') dalam tempoh dua bulan dari tarikh PJB. Walaupun pembeli telah memperoleh kelulusan JPA pada 9 Mei 1998, dia pohon agar

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tarikh selesai jualan bangunan tersebut dilanjutkan kepada 30 April 1999 supaya dapat memperoleh kewangan untuk belian hartanah itu. Perayu telah bersetuju dengan permintaan ini dengan syarat ia dibenarkan mengutip sewa untuk bangunan tersebut sehingga 30 April 1999 dan atas syarat bahawa pembeli membayar 5% faedah ke atas deposit hingga 30 April. Pembeli bersetuju dengan terma-terma itu dan tarikh selesai telah dilanjutkan kepada 30 April 1999. Hasil daripada jualan bangunan tersebut telah ditaksir untuk cukai pendapatan bagi tahun taksiran 1999, iaitu tahun asas 1998. Perayu telah merayu kepada Suruhanjaya Khas Cukai Pendapatan ('Suruhanjaya Khas') terhadap taksiran yang ditimbulkan oleh responden. Di hadapan Suruhanjaya Khas itu, perayu berhujah bahawa hasil daripada jualan bangunan tersebut patut ditaksirkan bagi tahun taksiran 2000, iaitu tahun asas 1999, kerana jualan selesai pada 30 April 1999. Perayu berhujah bahawa terma-terma PJB adalah berbeza semasa ia bersetuju untuk melanjutkan tarikh selesai jualan bangunan tersebut kepada 30 April 1999 dan bahawa ini adalah bersesuaian dengan prinsip-prinsip perakaunan yang diterima dan kebiasaan amalan komersial. Oleh itu perayu berhujah bahawa menurut tarikh selesai ini, responden hanya patut menimbulkan taksiran untuk tahun taksiran 2000. Responden sebaliknya berhujah bahawa jualan bangunan tersebut terakru pada akhir tahun 1998 apabila PJB tidak lagi bersyarat dengan pematuhan syarat-syarat yang ditetapkan dalam PJB itu. Oleh demikian ia adalah kes responden bahawa tahun taksiran yang relevan dengan jualan bangunan tersebut adalah tahun taksiran 1999. Jawatankuasa khas mendapati bahawa jualan telah selesai pada 9 Mei 1998, iaitu tarikh kelulusan JPA diperoleh dan bahawa hasil daripada jualan bangunan tersebut perlu ditaksirkan untuk tahun taksiran 1999 (item 1 arahan keputusan). Bahkan, Suruhanjaya Khas juga mendapati bahawa responden tidak patut mengenakan penalti di bawah s 113(2) Akta Cukai Pendapatan 1967 ('Akta tersebut') dan bahawa penalti yang dikenakan patut sewajarnya diketepikan (item 2 arahan keputusan); dan bahawa perbelanjaan keahlian golf perayu bukan perbelanjaan hiburan dan oleh itu boleh dipotong di bawah s 33 Akta tersebut (item 3 arahan keputusan). Ini adalah rayuan perayu terhadap item 1 arahan keputusan dan rayuan balas responden terhadap item-item 2 dan 3 arahan keputusan yang sama. Perayu berhujah bahawa Suruhanjaya Khas terkhilaf dari segi undang-undang dan telah mencapai kesimpulan yang tidak konsisten dengan fakta utama dan bahawa di bawah s 24 Akta tersebut hanya hutang yang perlu dibayar adalah dianggap sebagai pendapatan kasar. Ia adalah kes perayu bahawa dalam kes ini pembeli tidak berhutang dengan perayu sehingga tarikh selesai itu, iaitu 30 April 1999, dan oleh kerana hutang itu hanya timbul pada 1 Mei 1999 ia patut ditaksir untuk tahun taksiran 2000.

Diputuskan, menolak rayuan perayu dan rayuan balas responden tanpa perintah untuk kos:

(1) Walaupun s 23 Akta tersebut tidak secara spesifik memberi maksud

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perkataan 'debt', inferens boleh dibuat daripada kepala nota dan kata-kata pembuka seksyen tersebut bahawa niat badan penggubal adalah agar s 23(a) Akta tersebut digunakan bagi mentafsirkan maksud perkataan 'debt' dalam s 24 Akta tersebut. Apabila s 23(a) Akta tersebut digunapakai kepada perkataan 'debt' dalam s 24 Akta tersebut maka ia membawa maksud hutang dalam jumlah boleh dikira, sama ada atau tidak tertunggak atau tertunggak dan perlu dibayar. Oleh itu, apa-apa jumlah yang ditentukan dalam apa-apa tempoh asas yang relevan berkaitan apa-apa stok yang dijual atau perkhidmatan yang diberikan akan dianggap sebagai pendapatan kasar seseorang bagi tempoh tersebut. Oleh itu, persoalan sama ada atau tidak jumlah itu tertunggak atau tertunggak dan perlu dibayar tidak timbul selagi jumlah itu ditentukan dan s 24 Akta tersebut berkuat kuasa untuk memberi kuasa kepada responden untuk mengenakan cukai ke atas hutang yang belum tertunggak atau tertunggak dan perlu dibayar. Dalam kes ini, hutang berkaitan jualan bangunan tersebut telah ditentukan di akhir tahun asas 1998 dan fakta bahawa jumlah itu perlu dibayar atau boleh dibayar kemudian tidak menukar kenyataan bahawa sekiranya jumlah telah ditentukan dan stok dagangan dijual, jumlah tersebut boleh dikenakan cukai untuk tahun jumlah itu ditentukan. Oleh itu Suruhanjaya Khas adalah betul dari segi fakta dan undang-undang apabila diputuskan bahawa PJB tersebut menjadi mutlak dan tidak bersyarat setelah pembeli mendapat kelulusan JPA dan jumlah tersebut menjadi tertunggak atau hutang yang perlu dibayar kepada perayu bagi tahun taksiran 1999 (lihat perenggan 22, 27, 38 & 42).

(2) Walaupun perayu betul dan di bawah s 24 Akta tersebut hanya hutang yang perlu dibayar boleh dianggap sebagai pendapatan kasar, berdasarkan fakta rayuan ini terdapat jumlah yang perlu dibayar kepada perayu oleh pembeli di akhir tahun asas 1998. Setelah menentukan bahawa terdapat jumlah yang perlu dibayar kepada perayu dalam tahun asas 1998, persoalan yang timbul adalah sama ada jumlah tersebut membentuk 'debt owing' di bawah s 24 Akta tersebut. Walau bagaimanapun, kes-kes yang dipetik oleh perayu menyokong definisi undang-undang 'debt' atau 'debt owing' dan tiada kaitan dengan ss 23 dan 24 Akta tersebut tetapi kepada maksud 'debt' secara umum di bawah undang-undang (lihat perenggan 32–35).

(3) Perkataan 'debt' dalam s 23(a) Akta tersebut tidak patut ditafsirkan sebagai bermaksud 'payable' kerana peruntukan jelas menyatakan 'due or due and payable'. Niat Parlimen menggunakan perkataan 'or' adalah supaya peruntukan patut dibaca secara berasingan dan untuk memberikan maksud berbeza kepada perkataan 'due' dan perkataan 'payable' (lihat perenggan 41 & 43).

(4) Suruhanjaya Khas adalah betul dalam penemuan mereka bahawa

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pulangan salah perayu dibuat denga niat baik dan bahawa penalti yang dikenakan oleh responden berkaitan yang sama patut diketepikan. Hujah responden bahawa s 113(2) Akta tersebut tidak memberikan pembelaan niat baik adalah tidak berasas. Peruntukan penalti dalam s 113(1) dan (2) Akta tersebut adalah untuk menghukum pembayar cukai yang dengan sengaja menghantar pulangan cukai dan maklumat yang tidak betul dan bukan niat Parlimen untuk menghukum pembayar cukai yang tidak bersalah. Tambahan pula, ia tidak mandatori untuk responden mengenakan penalti dalam semua audit cukai (lihat perenggan 51).

(5) Hujah responden bahawa Suruhanjaya Khas terkhilaf kerana membenarkan perbelanjaan keahlian golf dipotong walhal notis taksiran bagi tahun taksiran 2002 perayu tidak menunjukkan pendapatan yang dikenakan caj adalah tidak berasas (lihat perenggan 55).]

Notes:

For cases on accessment, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2384–2414.

Cases referred to

CKBL v KPHDN [1996] 248 CJ 177 (refd)

Foo Loke Ying & Anor v Television Broadcast Ltd & Ors [1985] 2 MLJ 35, SC (refd)

Government of Malaysia v Preston Corporation (M) Sdn Bhd [1982] 1 MLJ 293 (refd)

Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co [1992] 2 MLJ 708; [1992] 1 CLJ (Rep) 135, SC (refd)

R v Canadian Pacific Railway Co [1911] AC 3259, PC (refd)

RT Ltd v Director-General of Inland Revenue [1972] 2 MLJ 205 (refd)

Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners) [1993] 1 MLJ 149; [1993] 11 CLJ 555, HC (refd)

Yarrows v Frowde Ltd [1934] 3 DLR 711 (refd)

Legislation referred to

Income Tax Act 1967 ss 23, 23(a), 24, 24(1)(a), 25, 26, 27, 28, 33(1), s 39(1)(I), 113(1), (2)

DP Naban (Saravana Kumar with him) (Lee Hishamuddin Allen & Gledhill) for the appelant.

Ahmad Ishak bin Mohd Hassan (Norsalwani bt Muhd Nur with him) (Legal Officer, Inland Revenue Department) for the respondent.

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Alizatul Khair J:

[1] This is an appeal by the appellant Office Park Development Sdn Bhd against the decision of the Special Commissioners of Income Tax ('Special Commissioners') dated 11 September 2007 ('said deciding order'). The appellant's appeal is confined to item 1 of the said deciding order. In item 1 of the said deciding order, the Special Commissioners held that the proceeds from the sale of building A were to be assessed for income tax in the year of assessment 1999.

[2] The respondent, the Director General of Inland Revenue, had cross-appealed against item (ii) and (iii) of the said deciding order, which the Special Commissioners had ruled in favour of the appellant.

[3] The issues for determination by the Special Commissioner were as follows:

(a) In, which basis year is the sale of building 'A' to be recognised for tax purpose?

(b) Whether revenue was correct in imposing a penalty under s 113(2) of the Income Tax Act 1967 ('ITA') on the tax payer for the year of assessment 1999?

(c) Whether the golf membership expenses incurred by the tax payer are disallowable under s 39(1)(I) of the ITA by reason of it being entertainment expenses?

[4] The material part of the said deciding order reads as follows:

> ADALAH DIPUTUSKAN bahawa perolehan daripada penjualan Bangunan A Citra Emas Sdn Bhd hendaklah ditaksir dalam tahun taksiran 1999; (item (i))
>
> ADALAH DIPUTUSKAN JUGA bahawa penalty yang dikenakan dibawah Seksyen 113(2) Akta Cukai Pendapatan 1967 bagi Tahun Taksiran tersebut hendaklah dibatalkan; (item (ii))
>
> SETERUSNYA DIPUTUSKAN JUGA bahawa perbelanjaan sebanyak RM780,000.00 adalah dibenarkan dibawah Seksyen 33(1) Akta Cukai Pendapatan 1967 … (item (iii))

[5] The brief facts as agreed and stated by the Special Commissioners which are material to item (i) are as follows:

(a) The appellant and the purchaser signed a sale and purchase agreement ('SPA') on 4 March 1998 in relation to building A.

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(b) The SPA was conditional on the purchaser obtaining approval from the foreign investment committee ('FIC') within two months from the date of the SPA. The condition was fulfilled on 9 May 1998.

(c) The purchaser wrote to the appellant on 15 May 1998 and requested for the completion to be extended to 30 April 1999 due to the difficulty in paying.

(d) The appellant agreed by letter dated 20 May 1998 to extend the completion date to 30 April 1999 provided —

(i) the appellant would collect the rents until 30 April 1999; and

(ii) the appellant would charge the purchaser a 5% interest until 30 April 1999 on the deposit.

(e) The appellant collected the rent from the time the building became tenanted until 30 April 1999. From 1 May 1999 onwards the purchaser collected the rent.

(f) The rent collected by the appellant were recorded as business income in the books of the appellant. The appellant was accordingly assessed for income tax on the business income by the respondent.

(g) The appellant's books recorded the interest due and payable as interest income. The appellant was accordingly assessed for income tax on the interest income by the respondent.

(h) After the completion date, namely after 30 April 1999, the appellant ceased to collect the rent and imposed a 5% interest.

(i) The appellant's first witness ('AW1') testified that the appellant took efforts to sell building A to third parties when the purchaser had difficulty to secure finance for the property.

(j) AW1 also testified that the appellant paid the service charge and made maintenance contribution for building A until 30 April 1999.

(k) The appellant's second witness ('AW2') testified that the appellant's treatment of the sale of building A to be completed on 30 April 1999 was in accordance to the accepted accounting principles and ordinary commercial practice that were applicable.

[6] As regards *item (i)*, the issue posed by the appellant is whether on the facts found and stated, the Special Commissioners' decision that the proceeds from the sale of building A were to be assessed in the year of assessment 1999 (ie basis year 1998) was correct in law.

[7] The Special Commissioners held that the sale was completed on 9 May 1998 ie the date the FIC approval was obtained.

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[8] The contention of the appellant is that the said proceeds were to be assessed in the year of assessment 2000 (ie basis year 1999) as the sale was completed on 30 April 1999. According to the appellant the sale and purchase agreement (the agreement) signed between the appellant and the purchaser on 4 March 1998 was varied when the appellant agreed to extend the completion date of the sale of building A to 30 April 1999. Thus the appellant maintained that the sale of building A was complete on 30 April 1999 when the appellant cased to collect rent imposed a 5% interest and delivered vacant possession. In their view the position that the sale of building A was complete on 30 April 1999 was in accordance with accepted acounting principles and ordinary commercial practice. By virtue of this completion date, the respondent should only raise assessment in the year of assessment 2000.

[9] The appellant further contended that the Special Commissioners had erred in law in arriving at their decision on the grounds that they had:

(a) misdirected themselves on the law;

(b) took into account factors which they ought not have;

(c) reached a conclusion on facts which is not supported by evidence; and

(d) reached a conclusion that is inconsistent with the primary facts found by them.

[10] The respondent on the the other hand contended that the sale of building A accrued in year ending 1998 when the agreemant became unconditional upon fulfillment of certain conditions set out in the agreemant. Thus the relevant year of assessment in relation to the sale of building A is the year of assessment 1999.

[11] In their view therefore the Special Commissioners had not committed any error of law in arriving at their decision.

DECISION

[12] After hearing both the appellant and the respondent, I found that in arriving at their decision the Special Commissioners did not err in law or misconstrue the facts nor did they make their findings in the absence of any evidence. Consequently I was of the view that both the appeal and the cross appeal ought to be dismissed with no order as to costs.

[13] My reasons are as follows:

[14] The provision pertaining to gross income from a business under the

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Income Tax Act 1967 (ITA) is contained in s 24 of the ITA. In this regard proceeds from the sale of building A under the agreement is an income from a business source.

[15] Section 24 of the ITA provides as follows:

> 24 Basis period to which gross income from a business is related
>
> (1) Where in the relevant period *a debt* owing to the relevant person arises in respect of —
>
> (a) any stock in trade sold (or parted with on requisition or compulsory acquisition or in a similar manner) in or before the relevant period in the course of carrying on a business.
>
> (b) ...
>
> (c) ...
>
> the amount of the debt shall be treated as gross income of the relevant person from the business for the relevant period.

[16] Put simply s 24 of the ITA provides that any amount of debt that arises in a particular year of assessment in respect of any stock sold in that year, or any services rendered, is considered as gross income of a person for that particular year of assessment.

[17] Section 23 of the ITA stipulates that:

> 23 For the purpose of sections 24 to 28 —
>
> (a) A reference to a debt is a reference to a debt in a liquidated sum (*whether or not due or due and payable*).
>
> (b) ...
>
> (c) ...
>
> (d) ...

(Emphasis added.)

[18] Applying s 23(a) to s 24 therefore the word 'debt' in s 24 of the ITA means as follows:

(a) debt in a liquidated sum

(b) whether or not due or due and payable.

[19] The ITA does not define the word 'liquidated sum'.

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[20] *Blacks Law Dictionary* defines 'liquidated amount' to mean as follows:

> 'a figure readily computed based on the agreements terms' whilst 'liquidated debt' is defined as —
>
> 'a debt whose amount has been determined by agreement of the parties or by operation of law'.

[21] As to the phrase `Whether or not due or due and payable' under s 23 of the ITA, I agree with the respondent's submission that the implication of those words is that under s 24 of the ITA a liquidated sum is considered a debt whether or not the liquidated sum is due or due and payable.

[22] Thus as held by the Special Commissioners, by virtue thereof any amount or sum ascertained in any relevant basis period in respect of any stock sold or services rendered will be treated as gross income of a person for that period. As such the question of whether or not the sum is due or due and payable does not arise as long as the amount is ascertained.

[23] The appellant had argued that under s 24 only a *debt owing* is to be treated as gross income. In the present case, the purchaser does not owe a debt to the appellant until the completion of the agreement. The Special Commissioners had found as a fact that the agreement was completed on 30 April 1999. Therefore the debt for the purposes of s 24(1)(a) only arose on 1 May 2009 which means that the sale is to be recognised in the basis year 1999 ie year of assessment 2000.

[24] In support of their argument the appellant contended that s 23 and s 24 of the ITA do not define a debt. It merely describes a debt that is chargeable to tax for the purpose of a gross income of a person from a business source in a year of assessment.

[25] Thus according to the appellant the more pertinent question to be determined is what is a debt. If a debt does not arise in law, then ss 23 to 24 will not apply. The appellant referred to several definitions of debt one of which defines it as 'not only an obligation of the debtor to pay but also the right of a creditor *to receive and enforce payment*. For tax purposes a *debt* is a legally enforceable obligation for payment of money'. (*CKBL v KPHDN* [1996] 248 CJ 177 (CBKL)).

[26] According to the appellant also based on several authorities, in a sale and purchase agreement, it is settled law that a debt only arises on the date of completion (*RT Ltd v DG of Inland Revenue* [1972] 2 MLJ 205, *R v Canadian Pacific Railway Co* [1911] AC 3259 (Privy Council)).

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[27] In the appellant's view based on the offer letter and Schedule 2 of the agreement the appellant is only entitled to the purchase price upon satisfaction of the conditions stipulated therein. Until the conditions are satisfied, the appellant is not entitled to the total purchase price and a debt in that respect cannot arise until then.

[28] In my view s 24 of the ITA empowers the respondent to tax a debt which is not yet due or due and payable.

[29] In the instant case, reverting to the facts of the case again, the appellant and the purchaser had entered into an agreement to sell and purchase building A on 4 March 1998. The agreement was conditional on the purchaser obtaining approval from the FIC within two months from the date of the agreement.

[30] Clause 5.3 of the agreement provides that the agreement shall be come unconditional when the conditions set out in cll 5.1 and 5.2 have been fulfilled.

> this agreement shall become unconditional upon the date when the conditions set out in sub-clauses 5.1 and 5.2 have been fulfilled and the relevant letters of approval has been forwarded to the vendor.

[31] The conditions set out in cll 5.1 and 5.2 had been fulfilled on 9 May 1998. The purchaser himself by a letter dated 15 May 1998, confirmed that the FIC approval was obtained on 9 May 1998. This is an undisputed fact.

[32] Based on the facts of this case, the debt in respect of the sale of building A was ascertained at the end of the basis year 1998. The amount ascertained was in respect of a business or sale by the appellant in that year. For the purpose of s 24(1)(a) of the ITA, the business or sale refers to the stock in trade sold by the appellant to the purchaser during that year.

[33] The fact that the amount is to be paid or payable later (when the purchaser makes full payment towards the purchase of building A in the basis year of 1999), does not in law change the proposition that once the sum is ascertained and the stock in trade has been sold, that sum is taxable in the year the sum is ascertained. In effect what it means is that after the agreement became absolute and unconditional ie upon obtaining the FIC approval, the essential terms of the contract becomes enforceable and the purchase price will crystallise into a debt and be recoverable. As such it will have to be brought in as gross income irrespective of the due date of payment as long as the amount is ascertained.

[34] Even if, for the sake of argument, the appellant is right that under s 24

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only a *debt owing* is to be treated as gross income and that s 23 to s 24 do not define a debt but merely describes a debt that is chargeable to tax for the purpose of s 24 of the ITA, it is my view that based on the definition of 'debt as set out in CBKL and in the case of *Watta Battery Industries Sdn Bhd v Uni–Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners)* [1993] 1 MLJ 149; [1993] 11 CLJ 555, HC and *Jowitts Dictionary of English Law* (2nd Ed) which held that 'A debt exists when a certain sum of money *is owing* from one person (the debtor) to another (the creditor) … Debt denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and agree to payment', based on the facts of this appeal there is a sum owing to the appellant by the purchaser at the end of the basis year 1998.

[35] Having ascertained there is a sum owing to the appellant in the basis year 1998, the question that arises is whether that sum constitutes a 'debt owing' under s 24 of the ITA. As argued by the appellant a 'debt owing does not only mean an obligation to pay but also the right of the creditor to receive and enforce payment. Further as this is a sale and purchase of a landed property (viz building A), then relying on, inter alia, *RT Ltd v DG of Inland Revenue* and *R v Canadian Pacific Railway*, a debt only arises on the date of completion which is usually after the complete conveyance of the property.

[36] Thus as the sale is completed only on 30 April 1999 in this case the right to enforcement of the debt only arose after that date. In other words, the 'debt owing to the appellant only arose in the basis year of 1999.

[37] To my mind the definition of 'debt owing' as argued by the appellant above can only be sustained if one were to ignore or disregard the provisions of s 23 of the ITA.

[38] Although s 23 does not specifically define the word 'debt' as such it can be inferred from the headnote which reads 'Interpretation of ss 24–28' and the opening words of that section 'For the purposes of ss 24 to 28' that the intention of the Legislature is that s 23(a) is to be used to construe the meaning of the word 'debt' in s 24.

[39] Thus reading s 23(a) together with s 24 it is unequivocally clear that for the purpose of s 24 a debt means a debt in a liquidated sum (*whether or not due or due and payable*).

[40] The resulting effect is that a debt arises in respect of a liquidated sum irrespective of whether a sum is due or due and payable. In other words irrespective of the legal definition of 'debt' or 'debt owing' as argued by the appellant above, for the purposes of the ITA in particular s 24 in this case, that definition cannot be wholly applicable by virtue of the provision of s 23(a). In

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this regard I would have to disagree with the Appellant's proposition that ss 23 and 24 will only apply if there is a debt in law. To accept that proposition would be to ignore the clear words of s 23 of the ITA. The cases cited by learned counsel for the appellant in support of the legal definition of 'debt' or `debt owing' do not relate to my s 23 to s 24 of the ITA but to the meaning of'debt generally under the law and in the case of *R v Canadian Pacific Railway* in relation to the meaning of the word 'sold' in the context of that case.

[41] As to the word 'due' in s 23(a) of the ITA it should not be construed to mean 'payable' because the provision clearly states 'due or due and payable'. The intention of Parliament in using the word 'or' was that, the said provision should be read disjunctively. If the word 'due' has the same meaning with the word 'payable', such contention defeats the intention of the Parliament in enacting the provision.

[42] in the case of *Foo Loke Ying & anor vs Television Broadcast Ltd* [1985] 2 MLJ 35, Abdoolcader SCJ said as follows:

> on the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word of phrase appears in a statute, it was put there for a purpose and must not be regarded. In *Quebec Railway, Light, Heat, and Power Co Ltd vs Vandry*, Lord Sumner in delivering the judgment of the judicial committee said:
>
> 'secondly, there is no reason why the usual rule should not apply to this as to other statutes-namely, that effect must be given, if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain'

[43] The intention of Parliament when enacting the words 'due or due and payable' is to provide a distinct meaning to the word 'due' and the word 'payable'.

[44] Therefore for the reasons stated above, the Special Commissioners were correct both in fact and in law when they held that the sale and purchase agreement became unconditional upon the purchaser obtaining the approval from the FIC and thus the amount became due or a debt owing to the appellant in the year of assessment 1999.

[45] The appeal by the appellant against the decision of the Special Commissioners as regards *item (i)* is accordingly dismissed.

[46] As regards *item (ii)* of the Special Commissioner's decision ie — 'Whether Revenue was correct in imposing a penalty under s 113(2) of the Income Tax Act (ITA) on the taxpayer for the year of assessment 1999'

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[47] I agree with the Special Commissioners finding that as the incorrect return or incorrect information was made in good faith, the penalty imposed should accordingly be waived.

[48] The respondent's contention that s 113(2) did not provide the defence of good faith is without basis. As submitted by learned counsel for the appellant, s 113(2) of the ITA operates as an alternative provision to s 113(1). The construction of s 113(2) is redundant if it is made without any reference to s 113(1). The wordings of s 113(1) and r 113(2) are the same as both provisions are aimed at a tax payer who:

(a) makes an incorrect return by omitting or under stating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax of the chargeability to tax of any other person.

[49] In this regard the Supreme Court in *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co* [1992] 2 MLJ 708; [1992] 1 CLJ (Rep) 135 (*Kim Thye*) had firmly rejected the respondent's argument that it need not be satisfied whether the tax payer had acted. in good faith for the purpose of s 113(2) as good faith was confined to s 113(1) of the ITA.

[50] As opined by appellant counsel, following *Kim Thye* there is no basis for the respondent to argue that good faith is confined to s 113(1) alone.

[51] It is worth noting that the Canadian Court of Appeal in *Yarrows v Frowde Ltd* [1934] 3 DLR 711 held that 'a penalty is a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited or omitted to do some act that is required to be done. The term involves *the idea of punishment*, either corporal of pecuniary …'. The penalty provision in ss 113(1) and 113(2) is to punish taxpayers who deliberately submit incorrect tax return and information. It cannot be the intention of Parliament to punish taxpayers who innocently submit incorrect tax returns or those taxpayers who engage professional tax agents to prepare and submit their tax returns.

[52] Further it is not mandatory for the respondent to impose penalty in all tax audits. I agree that the fact that the respondent has a discretion amplifies the appellant's submission that a penalty should not be imposed in this case as the appellant had acted in good faith and made full disclosure of information.

[53] In light of what has been stated above and in view of the clear decision

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of the Supreme Court in *Kim Thye*, the respondent's appeal in relation to the penalty ie *item (ii)* is without any legal basis and is therefore dismissed.

[54] As for *item (iii)* ie on the golf membership expenses I am of the view that the Special Commissioners were correct in law in holding that the golf membership expense incurred by the appellant were not entertainment expenses and thus, were deductible under s 33(1) of the ITA. As found by the Special Commissioners, golf memberships were not given for free as the cost of golf membership was included in the selling price of the Palmview bungalows. As pointed out by the Special Commissioners 'the purchaser had the option of not purchasing the golf memberships, had the price of this bungalows reduced by RM25,000'.

[55] The main thrust of the respondent's argument with respect to this issue however is that the Special Commissioners had erred in law when allowing the said expenses to be deducted as, in law the respondent have no right of appeal to the Special Commissioners, since the return form which is also the notice of assessment for the respondent showed that there was no chargeable income for the year of assessment 2002 in question.

[56] The Special Commissioners had rejected the respondent's argument on this issue and I see no reason to disagree with the Special Commissioners.

[57] As pointed out by appellant counsel a similar objection was raised by the respondent in the High Court case of the *Government of Malaysia v Preston Corporation (M) Sdn Bhd* [1982] 1 MLJ 293 (*Preston Corp*) and the Supreme Court of *Kim Thye*.

[58] In both those cases, the taxpayers sought to pursue an appeal to the Special Commissioners against the penalty imposed by the respondent under s 113(2). The respondent refused to forward the taxpayers' notices of appeal to the Special Commissioners pursuant to s 99 of the ITA on the basis that one may only appeal against an assessment, which is confined to chargeable income.

[59] The High Court in *Preston Corp* and the Supreme Court in *Kim Thye* dismissed the respondent's contention and held that assessment was not confined to chargeable income alone.

[60] Following the decision of the Supreme Court in *Kim Thye*, s 99 of the ITA does not state that the appellant may not appeal to the Special Commissioner if it only has carried forward losses in the year of assessment 2002. As such, the respondent's contention that an assessment and an appeal to

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A the Special Commissioner are limited only to situations where the appellant has chargeable income is without any legal basis.

[61] The respondent's appeal against the Special Commissioners on *item (iii)* is therefore dismissed.

B

Appellant's appeal and respondent's cross-appeal dismissed with no order as to costs.

C Reported by Kohila Nesan

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